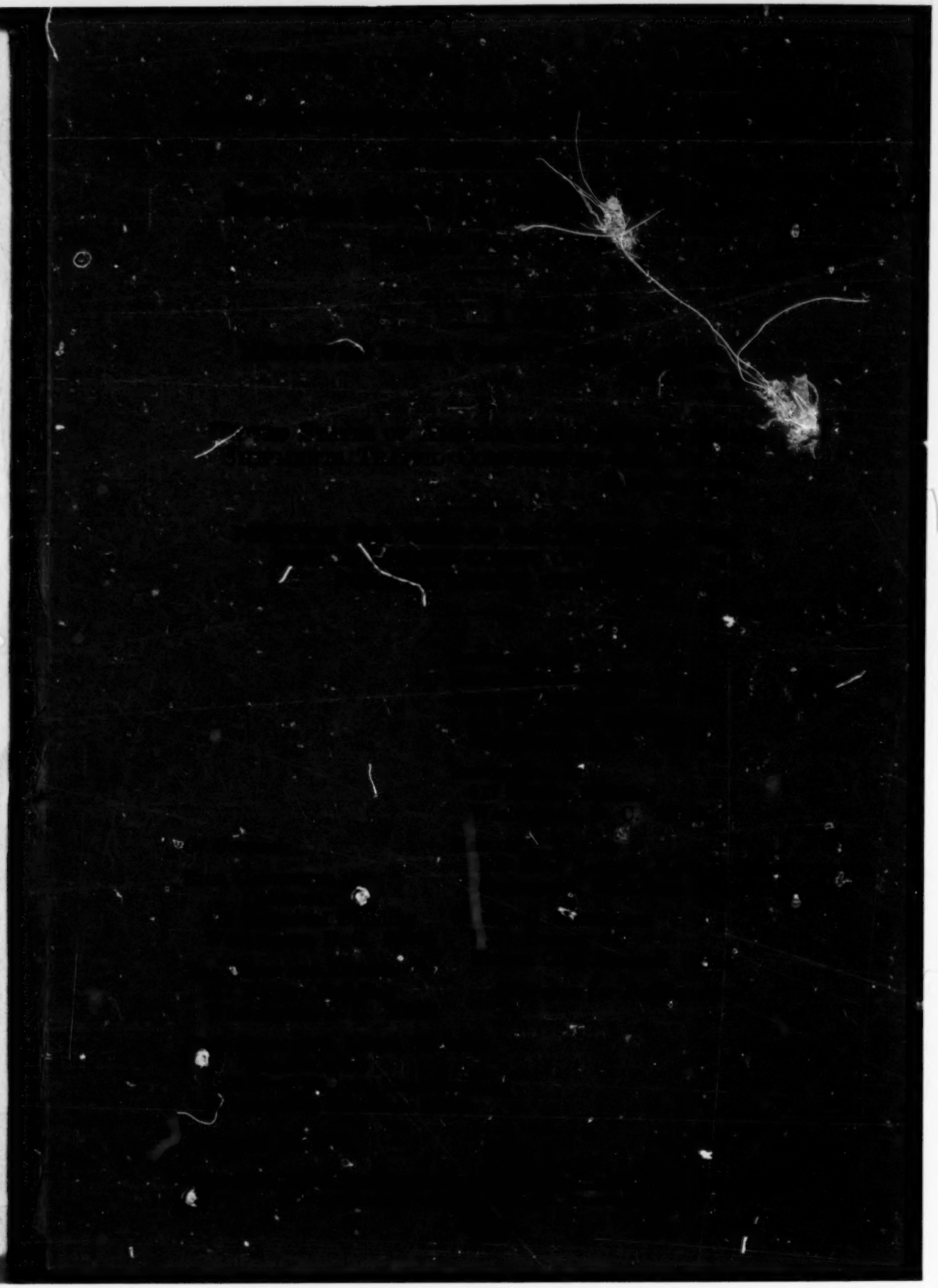

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 6, 1970.

OPINIONS BELOW

The opinion of the court below of which review is sought was entered October 6, 1970, in No. 19,863, *Middlewest Motor Freight Bureau* v. *United States of America,* and No. 19,870, *Middlewest Motor Freight*

Bureau v. *National Small Shipments Traffic Conference,* is printed at 433 F. 2d 212, and appears in Appendix A hereto. Earlier opinions by the District Court and respondent Interstate Commerce Commission [Commission] are as follows: judgments, findings of facts, and conclusions of law of the United States District Court for the District of Minnesota, Fourth Division, April 9, 1969, and September 5, 1968, in 4-65 Civ 285, *Middlewest Motor Freight Bureau* v. *United States of America* (Appendix B); Decision and Order of the Commission of February 24, 1965, in Docket No. M-17450, *LTL Class Rates & Minimum Charges Between Middlewest and Central Territories,* 325 I.C.C. 106 (1965) (Appendix C).

JURISDICTION

The jurisdiction of this court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on October 6, 1970. A petition for rehearing was filed and was denied by order entered on November 16, 1970.

QUESTIONS PRESENTED

1. Where there has been a denial of an interlocutory injunction and the dissolution of a temporary restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates, does a court have power to grant counterclaims for restitution when there has been no adjudication of the merits of the carriers' claim that the Commission's order is invalid?

2. Does a court have power to order restitution for damages caused by the restraint of an order of the Interstate Commerce Commission directing motor com-

mon carriers to cancel increased rates without a determination by the Commission that they were unjust and unreasonable or that they exceeded maximum reasonable rates during the period of the restraint?

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act and the Interstate Commerce Act involved in this case are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Petitioners are the Middlewest Motor Freight Bureau, Inc. (Middlewest) and motor common carriers for which Middlewest acts as agent for the purpose of publishing tariffs setting forth the rates and charges of the carriers for the performance of transportation. Because of a need for increased revenues to meet increased costs of operations the carriers in 1963 directed Middlewest to publish for their account less-than-truckload rates increased by five percent and minimum charges [1] increased by 50 cents each.

The tariffs were initially suspended by the Commission, but subsequently, upon a finding by it that the carriers were in immediate need of additional revenue, the suspension was vacated and the tariffs allowed to become effective on September 7, 1963. However, the Commission continued its investigation. During the course thereof and again in response to a need for still more revenue, the carriers published and the Commission permitted to become effective on May 14, 1964, a greater increase in the minimum charges. The mini-

[1] Minimum charges are fixed amounts for the transportation of a shipment, no matter how small.

mum charges as thus further increased were never made subject to the investigation which proceeded to a conclusion and culminated in the issuance of an order by the Commission on February 24, 1965, finding the rates "not shown to be just and reasonable" and directing their cancellation. Nothing was said therein about what rates and charges were to be published in the schedules supplanting the schedules to be canceled and, as noted, some of them had already been supplanted by schedules naming even higher minimum charges than those ordered canceled. Because that order lies at the heart of the error committed by the Court of Appeals, the full text thereof is set forth below: (App. C p. 96a)

> "*It is ordered*, That the respondents herein be, and they are hereby, notified and required to cancel on or before April 14, 1965, the schedules described in the order entered on June 26, 1963, by the Commission's Board of Suspension upon not less than one day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.
>
> "By the Commission."

The Commission's decision of February 24, 1965, and the cancellation order issued by it on that date provided no guidance to the carriers as to rates and charges for prospective application. This was vital because during the months intervening between the hearing in the investigation case and the issuance of the Commission's decision therein the carriers had incurred substantially increased operating costs by reason of the labor contract with the Teamsters Union.

Through appropriate petitions they promptly sought reconsideration and rehearing of the Commission's decision and, upon denial of those petitions, they sought relief by two concurrent methods. First, on September 5, 1965, they filed on statutory 30 days' notice new schedules of rates and charges canceling those then in effect and naming even higher rates and charges than those which had been under investigation. Second, they brought suit in the United States District Court for the District of Minnesota (Fourth Division) under Sections 1336, 1398, 2284, and 2321-2325 of Title 28 of the United States Code to vacate, set aside, and annul the cancellation order of the Interstate Commerce Commission. They also sought and, on September 9, 1965, were granted a temporary restraining order as preliminary to an injunction *pendente lite* to restrain the Commission's cancellation order from taking effect on September 13, 1965. Meanwhile, they had postponed to November 16, 1965, the effective date of the new schedules naming the higher rates and charges so that the Commission might satisfy itself as to the urgent need on their part for not only retention of the rates and charges ordered cancelled but also for an increase in them to enable the carriers to meet their continually increasing operating expenses.

Thereafter, certain associations of shippers, having intervened as defendants, filed counterclaims seeking an award of damages *if the Commission's decision was affirmed.* Upon argument on September 24, 1965, the three-judge court declined to enter a preliminary injunction and dissolved the temporary restraining order, effective September 29, 1965. The carriers were then faced with the necessity of complying with the Commission's cancellation order.

On September 30, 1965, the carriers secured from the Interstate Commerce Commission a postponement of the effective date of the cancellation order to October 11, 1965, to allow them the time necessary to accomplish the compilation, printing, filing and distribution of new tariffs. In making this grant of extra time for cancellation, together with a grant of special permission to make the new tariffs effective on less than the 30-days' notice required by the statute (Section 217(c), 49 U.S.C. § 317(c)), the Commission directed, for the first time, that the carriers re-establish the level of rates which was in effect prior to the effectiveness of the rates and charges at issue in the case. No reason was given by the Commission for this requirement. Moreover, the order made no specific mention of the schedules naming the minimum charges under investigation which, as noted, had already been supplanted by schedules effective May 14, 1964, naming higher minimum charges which were not subject to the investigation. The Commission order of September 30, 1965, as described, is reproduced as Appendix E hereto.

The reduced rates thus required by the Commission took effect on October 11, 1965, but remained in effect only until November 16, 1965, upon which date the Commission permitted to take effect the new schedules of rates and charges which were even higher than those required to be canceled. Presumably the Commission was satisfied with the carriers' demonstration of revenue need because no event occurred between the date of filing those new schedules (September 5, 1965) and their effective date (November 16, 1965) which would otherwise explain the Commission's action.

With the cancellation of the subject matter of the Commission's investigation and the effectuation of

rates and charges producing revenues in excess of those which had been ordered canceled, the carriers perceived that their action to set aside the Commission's order had become moot. They thereupon filed an appropriate motion for dismissal of their complaint without prejudice and also for dismissal of the counterclaim of the associations of shippers. Prior to the hearing on this motion the United States was allowed to intervene as a shipper and to file a counterclaim for damages allegedly incurred during the period of the temporary restraining order.

The statutory three-judge court heard argument on both the merits of the carriers' complaint against the Commission decision and on their motion to dismiss both the complaint and the counterclaims. By its decisions of September 5, 1968, and April 9, 1969, Appendix B hereto, the court, without decision upon the merits of the carriers' complaint, granted the motion to dismiss in its entirety. Both the United States and the intervening associations of shippers noticed appeals to the Supreme Court from the judgments of the statutory three-judge court. Subsequently, the appeal of the United States, on its own motion, was dismissed. The intervening associations of shippers pressed their appeal which was dismissed for lack of jurisdiction. *National Small Shipments Traffic Conference, et al.* v. *Middlewest Motor Freight Bureau, et al.*, 396 U.S. 211 (1969).

Thereafter both the United States as a shipper and the intervening associations of shippers perfected their appeals of the dismissal of their counterclaims to the Court of Appeals. The Interstate Commerce Commission took no appeal. The case was briefed and argued to Judges Vogel, Gibson, and Bright, and

on October 6, 1970, the Court issued its opinion by Judge Gibson holding that the shippers were entitled to restitution in the amount of the difference between the level of rates at issue in the proceeding before the Commission, and the level of rates which was in effect prior to the publication of the rates involved in the Commission proceeding. (App. A) A petition for rehearing before the Court of Appeals was submitted and was denied by order entered November 16, 1970. The judgment of which review is here sought would reverse the judgment of the statutory court dismissing both the complaint and the counterclaims and would remand the case for disposition in accordance with the opinion of the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE IMPORTANCE OF THE QUESTIONS

There are indeed what Rule 19 (1) of this Court describes as "special and important reasons" for the grant of this petition. This is a case of first impression. So far as we are able to ascertain, no federal court has ever before held that courts have power, independently of action by the Interstate Commerce Commission, to require common carriers to make restitution of freight charges collected under applicable and effective tariffs duly filed with the Interstate Commerce Commission.[2] The Court of Appeals itself rec-

[2] In the only other case dealing with the question we have been able to find the District Court for the Northern District of Georgia dismissed on its merits a suit by motor carriers to enjoin an order of the Interstate Commerce Commission directing the cancellation of increased charges. At the same time the Court denied restitution of the increased charges collected during the period of the temporary restraint of the Commission's order. *Central and Southern Motor Freight Tariff Assn.* v. *U.S. and I.C.C.*, N.D. Ga. Civ. No. 12,484 (1969).

ognized that the resolution of the issues before it does far more than adjudicate the rights and duties of the parties here *vis a vis* each other on the particular facts of this case. This is so because the resolution of those issues turns, not only upon the particular facts of this case, but also upon the interpretation and application of general principles of law governing the relations between all shippers and motor carriers.

Moreover, the resolution of the question whether the power the Court of Appeals exercised exists, and if so, the conditions under which it may be exercised, significantly bears upon the interplay and division of authority between courts and the Interstate Commerce Commission under the statutory scheme for the regulation of the rates of motor carriers prescribed by the Congress, as well as upon the ability of motor carriers to exercise effectively their statutory right to the judicial review of orders of the Commission.

The two questions presented are federal questions decided by the Court of Appeals, "in a way in conflict with applicable decisions of this Court." (Rule 19 (1)(b)) Furthermore, in thus deciding those questions the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Question 1

Where there has been a denial of an interlocutory injunction and the dissolution of a temporary restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates, does a court have power to require the carriers to make restitution when there has been

no adjudication of the merits of the carriers' claim that the Commission's order is invalid?

To ask this question is to answer it in the negative. It is fundamental that there is no right to restitution based upon the issuance of a restraint *pendente lite* at the instance of a plaintiff unless the restraint was improvidently issued. And whether a restraint was improvidently issued turns upon whether or not the action or conduct restrained does in fact violate the plaintiff's legal rights. To state this fundamental rule in terms of the case here, there is no right to restitution from the motor carriers based upon the temporary restraint of an order of the Interstate Commerce Commission directing them to cancel increased rates unless there is first a determination that the Commission's order was in fact valid. Nevertheless, the Court of Appeals held that "the shippers' right to restitution did not require a determination on the merits of the [Commission's] order." (App. A, p. 59a). This holding is contrary to all applicable decisions of this Court, and the remand to the District Court without directions to make a determination of the merits of the Commission's order is a departure from the accepted and usual course of judicial proceedings. Indeed, the holding and remand are so patently erroneous that the simultaneous issuance of a writ of certiorari and summary reversal are warranted.

The Court of Appeals reasoned that the Commission's order was presumptively valid and did not become suspect because it was challenged; that the order "was at all times binding upon the carriers until they successfully concluded a suit proving its invalidity" (App. A, p. 56a); and that the dismissal of the carriers' suit to set the order aside, albeit with-

out prejudice, was a determination of the merits of the controversy for the purpose of determining their liability to make restitution. Also significant in the Court's view was the fact that the carriers were denied an interlocutory injunction. As the Court saw it when the carriers failed to prove grounds sufficient for the grant of an interlocutory injunction they showed that the temporary restraining order should not have been granted, "at least to the extent of rendering [them] liable in restitution for benefits received under the temporary restraining order." (App. A, p. 58a).

The Court of Appeals argued that prior case law is consistent with its conclusion, citing *Arkadelphia Milling Company* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134 (1919) and *Ex Parte Lincoln Gas & Electric Co.*, 256 U.S. 512 (1921). In both of those cases suits to enjoin orders fixing rates were dismissed without prejudice, and restitution was required for the period during which the orders had been temporarily restrained. Those cases are plainly inconsistent with the holding here because in both of them there was a final determination that the orders temporarily restrained were in fact valid, and permanent injunctive relief was denied on that ground.[3] As the Court of Appeals said, speaking of *Arkadelphia*, this Court there held that "the [carriers'] failure to carry their burden of proof on the *permanent* injunction was itself sufficient to show that the temporary injunction should not have been allowed." (App. A, p. 58a; emphasis supplied). But as the court itself recognized, the denial

[3] So too, in every case the Court of Appeals discussed in which a court required restitution of monies which would not have been collected but for the restraint of a rate order there was a final determination that the rate order was valid.

of an *interlocutory* injunction shows only that the temporary restraining order should not have been issued "in the absence of a later decision in the carriers' favor on the merits" (App. A, p. 58a). Thus, its holding that no decision on the merits of the Commission's order was necessary is contrary to its own statement of the law.

The only explanation for the holding of the Court of Appeals in this respect is that it viewed the carriers' voluntary dismissal of their suit to permanently enjoin the Commission's order as a waiver of their right to a determination of the merits of that order. "Here the carriers by their own actions rendered the issues in the main suit moot and procured the dismissal." (App. A, p. 57a). This view is untenable in that it fails to distinguish between the carriers' complaint for an injunction and the shippers' counterclaims for restitution. The underlying issue on both the complaint and the counterclaims was of course the validity *vel non* of the Commission's order directing the cancellation of increased rates. The carriers, by cancelling those rates and establishing higher rates in lieu thereof, of course mooted their cause of action for an injunction and thus made unnecessary the resolution of that issue in their suit. But they did not by those actions moot the shippers' cause of action for restitution and make unnecessary the resolution of that issue in their suit. The District Court properly so held, saying: (App. B, pp. 65-66a)

> " * * * Obviously, in light of the record, the issues between plaintiffs and the Interstate Commerce Commission and the United States have become moot, and a dismissal should be granted unless the intervention of the intervenors with their counterclaims requires a finding of this court as

> to the merits of plaintiffs' action against the Commission as a condition precedent to the enforcement of said counterclaims. Certainly, this court has ancillary jurisdiction, at least as to the counterclaim filed. On the other hand, if upon the admitted facts the counterclaimants have no enforcible claims against plaintiffs or their surety, no purpose will be served in passing upon the merits of plaintiffs' complaint in that these entire proceedings would then be moot and plaintiffs' motions should be granted."

The District Court then went on to appraise the equities and concluded that the counterclaims should be dismissed for want of equity. There was therefore no need for it to determine the validity of the Commission's order and it did not do so. The Court of Appeals, appraising the equities differently, concluded that the counterclaims should not have been dismissed and reversed the District Court. Having done so, it necessarily revived the question of the validity of the Commission's order and made requisite a remand of the case to the District Court to answer that question.

The Court of Appeals sought to bolster its erroneous conclusion with what it called the general rule that the voluntary dismissal of a suit for injunction by the plaintiff without the consent of the defendant, even though without prejudice, is a determination of the merits of the controversy so as to render the plaintiff and his sureties liable on an injunction bond. It cited for this proposition an annotation in 91 ALR 2d 1312. (App. A, p. 57a) It is significant that the case that gave rise to the annotation, *Rice* v. *White*, 147 So.2d 204, 91 ALR 2d 1306 (Fla. App. 1962), holds to the contrary. Moreover, both *Rice* and cases

discussed in the annotation distinguish between the situation in which, on the one hand, the dismissal of a suit for injunction terminates all litigation of the subject matter between the parties and, on the other hand, the situation in which it does not. Thus, *Rice* emphasized that after the entry of the temporary restraining order a second suit was filed involving the same parties and the same subject matter, and that the first suit was dismissed so that the issues could be determined in the second.

Discussed also in the annotation is *Fort Madison R. Co.* v. *Hughes,* 137 Iowa 122, 114 N.W. 10 (1907), in which the situation was closely analogous to that here. In that case, the plaintiff, a street railway, brought suit for an injunction and got a preliminary order restraining the defendants from conducting moving operations which interfered with its use of its streetcar tracks. Defendants filed a cross bill for an order directing the plaintiff to remove obstacles in the path of their moving operations. Thereupon the plaintiff dismissed its suit for a permanent injunction. The court held that judgment for the plaintiff on the defendants' cross bill barred their recovery of damages from the plaintiff grounded on a claim that the temporary restraint of the defendants was improvidently issued. So here, when the shippers filed their counterclaims for restitution and the carriers filed their answers thereto issue was joined on the validity *vel non* of the Commission's order, independently of the joinder of that issue in the carriers' suit for an injunction. As the Court of Appeals correctly holds, a judgment on that issue in favor of the carriers would bar restitution. Hence, if the counterclaims are not dismissed that issue must be resolved.

Beatty v. *Casselman,* 115 Neb. 104, 211 N.W. 617 (1926), also discussed in the annotation, is to the same effect. That was a suit for damages on a bond given by the defendant as a condition to the issuance of a temporary injunction restraining the plaintiff from removing sand and gravel from certain premises. The plaintiff rested his case on the fact that the defendant had procured the dismissal of his suit for injunction without prejudice. The court held that the dismissal did not, of itself, determine that the plaintiff was rightfully removing sand and gravel from the premises described in the temporary injunction. It therefore held that the defendant was entitled to plead facts to show that the plaintiff had no right to do so. To quote the court:

> "If plaintiff had not acquired and did not possess the right to remove sand and gravel from that part of the premises from which he was enjoined, it could not be urged that he was entitled to damages because he was enjoined from doing something that he had no right to do."

In the case at bar the shippers themselves recognized that a determination of the validity of the Commission's order was necessary on the issue of their right to restitution. On that ground they opposed the carriers' motion to dismiss the suit for injunction as moot. The fact that the carriers successfully pressed their motion to dismiss does not estop them from pursuing their challenge to the validity of the Commission's order in defense against the counterclaims for restitution. At no time did they concede the validity of the Commission's order. On the contrary, they argued their challenge to the order and, as the District Court made clear, it would have ruled upon

that challenge had it not determined that the counterclaims should be dismissed even if the order were valid.

Question 2

Does a court have power to order restitution for damages caused by the restraint of an order of the Interstate Commerce Commission directing motor common carriers to cancel increased rates without a determination by the Commission that they were unjust and unreasonable or that they exceeded maximum reasonable rates during the period of the restraint?

To hold, as did the Court of Appeals, that, as a basis of restitution, it may determine what rate should have been established where the Commission had not itself found the increased rates to be unjust or unreasonable is to run contrary to established precedent. Yet this is what the court did when it said that had there been no temporary restraint of the Commission's order of cancellation "the last lawful preexisting rates are the effective rates to be applied by a court in considering restitution" (App. A, p. 20a). Even had there been no restraining order and had the carriers disobeyed the order of cancellation, the increased rates would have still been the only legally applicable rates.

The Commission has itself held in countless cases that the failure of carriers to comply with a rate order of the Commission does not render the legally published rate inapplicable, *Ralston Purina Co.* v. *Atlanta, B. & C. R. Co.*, 174 I.C.C. 722, 724; *Texas Produce Co.* v. *Illinois Central R. Co.*, 209 I.C.C. 113, 114; *National Erie Corp.* v. *New York Central R. Co.*, 237 I.C.C. 4, 5 and 6 (1940); *Bacon Bros.* v. *Alabama*

G.S.R. Co., 263 I.C.C. 587, 590 (1954); *Armour & Co.* v. *Atchison, T. & S.F. Ry. Co.*, 292 I.C.C. 269, 272-273 (1954). The principle thus adhered to by the Commission was long ago recognized by the Supreme Court, *Texas and P. R. Co.* v. *Cisco Oil Mill*, 204 U.S. 449 (1907). Indeed, the Commission itself has made it plain that the maintenance by carriers of a rate in violation of the Commission's order does not *per se* give rise to a right to reparations. As a prerequisite to reparations there must be a finding by the Commission of the extent to which the rate exceeded the maximum reasonable rate.

In *Kansas City Fuel Oil Co.* v. *Atchison T. & S.F. Ry. Co.*, 210 I.C.C. 134 (1935) at page 136, the Commission said:

> "A rate published in a tariff on file with the Commission even though in contravention of its order would still be the legal rate. *Dewey Portland Cement Co.* v. *Atchison, T. & S.F. Ry. Co.*, 185 I.C.C. 233. Even if we were to assume that section 15 of the act was violated by defendants, reparation could not be awarded to complainants. Penalties or fines for such a violation are enforceable in the courts and accrue to the Government. *Hudson Mule Co.* v. *L. & N. R. Co.*, 129 I.C.C. 365, 371."

In its opinion (App. A, pp. 51a-52a) the Court of Appeals seeks to avoid the thrust of the foregoing decisions, and even to find support for its award of restitution by stating:

> "In every single case * * * where a timely action was brought by the shippers, and *where the carriers published tariffs which were found to have violated a Commission order, the Commission ordered reparations.*"

Most certainly the fact that the Commission ordered reparations in those cases gives no basis for restitution here. The Court of Appeals completely overlooks the fact that in those cases where reparations were awarded there was a prior Commission determination that the charges collected were unreasonable by a specified amount. The only teaching of these cases is that Commission orders prescribing rates or ordering rates to be cancelled do not in themselves effect a change in rates, and where carriers maintain rates in violation of such orders the violation itself is not a ground upon which reparations can be granted. Nor may restitution, as distinguished from reparations, be awarded without a determination by the Commission fixing the measure thereof in terms of maximum reasonable rates.

It is fundamental that a "zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." Absent some other unlawfulness, e.g., unjust discrimination, a carrier is entitled to establish such rates within the zone of reasonableness as to it seems wise. *U. S.* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 506 (1935). It is equally fundamental that only the Interstate Commerce Commission can determine whether particular rates are above the zone of reasonableness, i.e., exceed maximum reasonable rates. *T.I.M.E. Inc.* v. *U. S.,* 359 U.S. 464 (1959); *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). It follows that a shipper cannot recover from a carrier any part of freight charges paid on the basis of legally filed and published rates unless and until there has been a determination by the Commission that those rates exceed maximum rea-

sonable rates at the time the transportation to which they applied was performed. The Court of Appeals itself recognized these fundamental principles. It noted that "carriers may charge to shippers only the rates specified in [their] published tariffs." (App. A, p. 3a). And it was at pains to point out that it was "not expressing any affirmative judgment that the [increased rates the Commission ordered cancelled were] in any substantive way violative of the Act—e.g., that they [were] unreasonably high or discriminatory. Such a judgment lies solely within the province of the Interstate Commerce Commission." (App. A, pp. 14a-15a)

Nevertheless, the Court of Appeals, flying in the face of these principles, undertook to do what this Court has held is beyond its province, namely "to absorb to itself" the function of rate-making. *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U.S. 282, 286 (1934). The order of the Interstate Commerce Commission directing the cancellation of the increased rates at issue was not based upon a finding that those rates exceeded maximum reasonable rates. Nor was there any suggestion by the Commission, much less a finding, as to what rates could have been established in lieu of the rates ordered cancelled. While the court expressly recognized that there was no implication that the rates ordered cancelled were unlawful in any substantive sense either before or after the order of cancellation, its decision resulted in indirectly declaring those rates to be in excess of maximum reasonable rates during the period of restraint to the extent that they exceeded the pre-existing rates. Thus, it stated the question before it as whether the shippers were en-

titled to restitution for rates which "were higher than *could* be charged" but for the temporary restraint. (App. A, p. 8a; emphasis supplied). Again, it said that its task was to "determine whether, if the [Commission's order] went into effect, either because of carrier compliance or judicial enforcement, the result *would* be a reduction in the tariffs." (App. A, p. 10a; emphasis supplied). It then went on to determine that the only rates that "could have been charged" but for the temporary restraint were the immediately prior lower rates, and that, had the Commission's order gone into effect, the result would have been a reduction in rates to the immediately prior lower rates. (App. A, p. 29a). Thus, contrary to the statement in its opinion (App. A, p. 40a), the court here has adjudicated an issue within the primary jurisdiction of the Interstate Commerce Commission, as to which there has been no finding whatever by the Commission itself. (See App. C)

While the court conceded that there "is no case law on the subject" (App. A, p. 16a), it found "an analogy" in *Chicago, M., St. P. & P. R. Co.* v. *Alouette Peat Products Ltd.*, 253 F. 2d 449 (9th Cir. 1957), which it viewed as supporting the proposition that "the last lawful pre-existing rates are the effective rates to be applied by a court in considering restitution." (App. A, pp. 19a-20a). *Alouette* is wholly inapposite. In that case the Commission gave the railroads special permission to make effective on five days' notice specific increased rates on peat. The railroads published, filed and made effective on five days' notice increased rates in excess of those authorized. The court held that the higher increases, having been

made effective on less than thirty days' notice without permission, had not been legally established and that the "only existing legally established" rates were the prior rates. 253 F. 2d at 456. In other words, the court held that the illegally filed increased rates never became legal rates and that, therefore, the carriers had no legal right to collect them in the first instance even though, as the Commission had found, they did not exceed maximum reasonable rates. That is not the situation here. The increased rates here were legally established and thus supplanted the prior rates. As the Court of Appeals itself said, the carriers had the legal right to collect those increased rates during the entire period they were effective, including the period of the temporary restraining order. Hence, the prior rates were not, as they were in *Alouette,* the "only existing, legally established" rates, and thus that case has no applicability to the one at bar. The carriers here having legally collected the increased rates, are entitled to keep the proceeds thereof unless those rates exceeded maximum reasonable rates.

The Court of Appeals in effect recognized that the right to restitution its judgment would vindicate is the right to the recovery of freight charges to the extent that the rates on which those charges were based exceeded maximum reasonable rates. Thus, in rejecting the carriers' argument that the shippers' remedy by way of suit for reparations was available and exclusive, it held that the allowance of restitution was a permissible and preferable substitute because, inter alia, "[t]o remit the shippers to [their statutory remedy for reparations] would require the filing of a new lawsuit, a reference to the Commission, and subsequent judicial proceedings on the Commission's findings." (App. A, p. 41a). The reference to the

Commission would of course be for the purpose of securing its determination of the extent to which the increased rates ordered cancelled exceeded maximum reasonable rates, which is a prerequisite to an award of reparations. Plainly, if a remedy in restitution is a permissible substitute for a remedy in reparations, a reference to the Commission for such a determination is just as much a prerequisite to an award of restitution.

The conceded fact that the Commission did not determine whether the increased rates it ordered cancelled exceeded maximum reasonable rates distinguishes this case from all of those in which this Court has awarded restitution to shippers on the basis of the judicial restraint of a rate order. In all of those cases the situation was as in *Arkadelphia, supra,* that is, every order restrained fixed specific rates lower than those collected. Hence the measure of the damages caused by the collection of higher rates under the restraint was known.[4] The measure of damages is not known here and cannot be known without a determination by the Commission of the extent to which, if at all, the increased rates it ordered cancelled exceeded maximum reasonable rates.

The holding of the Court of Appeals that the measure of damages in restitution is the difference between the increased rates ordered cancelled and the immediately prior rates is inconsistent with the principle of this

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[4] So too, in *Accelerated Transport-Pony Express, Inc.* v. *U.S.,* 227 F. Supp. 815 (D.C. Vt. 1964), aff'd 379 U.S. 4 (1964), the Commission found certain of the carriers' rates "not shown to be just and reasonable because certain charges for short hauls were higher than those for long hauls" and ordered them cancelled *"to the extent of* [*the*] *discrepancy."* (App. A, p. 28a; emphasis supplied). Thus, the measure of damages was established by the Commission.

Court's holding in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U.S. 301 (1935). Pointing out that a cause of action for restitution is equitable in origin and function, this Court said: (295 U.S. at pp. 309-310)

> "* * * The claimant, to prevail, must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. * * *"

In *Atlantic Coast Line* the shippers paid higher intrastate rates than those prescribed by Florida under an order of the Interstate Commerce Commission directing them to do so to eliminate discrimination against interstate commerce. This Court held the Commission's order invalid for lack of necessary findings. Suit for restitution for monies collected by virtue of the Commission's invalid order was brought, grounded on the fact that but for that invalid order those monies would not have been collected. This Court nevertheless denied restitution. Its rationale was that a subsequent valid order of the Commission prescribing the same rates established that the rates collected by virtue of the invalid order were in fact no higher than the rates the shippers should have paid.

In short, *Atlantic Coast Line* held that a right to damages in restitution did not arise merely because higher rates were paid by virtue of an order of the Interstate Commerce Commission that should not have been issued. A further inquiry was necessary, namely, an inquiry whether the lower intrastate rates were in fact discriminatory against interstate commerce. That

inquiry having been made by the Commission and it having found that they were, restitution was denied. So here, a right to damages in restitution does not arise merely because higher rates were paid by virtue of a temporary restraining order of the District Court that should not have been issued.[5] A further inquiry is necessary, namely, an inquiry into the extent to which, if at all, those higher rates exceeded maximum reasonable rates. That inquiry not having been made by the Commission, the case must be referred to it in order to enable it to do so.

In this case both the District Court and the Court of Appeals recognized that, as this Court held in *Atlantic Coast Line,* the right to restitution turns on an appraisal of equities. The District Court concluded that the counterclaims should be dismissed for want of equity because it interpreted the Commission's action in postponing the effective date of the order of cancellation after the dissolution of the temporary restraint and in subsequently permitting still higher rates to be established as a determination that the rates ordered cancelled did not exceed maximum reasonable rates. The Court of Appeals was of the view that no such conclusion could be drawn from the Commission's actions. In addition, the Court of Appeals was of the view that whatever the reasons for the Commission's order postponing the date for complying with its order of cancellation, that postponement would not "affect the restitutional rights of the parties during the period when the court had jurisdiction of the case." (App. A, p. 60a) The court's

[5] As we have shown in our discussion of Question 1, a determination of the merits of the Commission's order is necessary before it can be determined whether the temporary restraint was in fact improvidently issued.

view is in error, because there were in this case no findings by the Commission that the rates ordered canceled were in specific violation of the Act. Indeed, the court itself recognized this, and for that reason *Inland Steel Co.* v. *U. S.*, 306 U.S. 153 (1939), upon which the court relied, does not support its holding. In that case this Court held that restitution could be granted notwithstanding that the Commission had postponed the effective date of its order after the court had restrained it. But its holding rested on the fact that there was indeed an unchallenged determination by the Commission that the monies paid by virtue of the judicial restraint of its order were in fact paid in violation of the Interstate Commerce Act.

In summary, both courts below based their opposite conclusions on speculation as to what rates the Commission thought were maximum reasonable rates during the period of the temporary restraint. But no court has authority either to determine whether rates exceed maximum reasonable rates or to speculate as to what the Commission's actions meant. It follows that no determination of whether any damages are due, nor the amount thereof, can be made until there has first been a determination by the Commission as to what rates would have been maximum reasonable rates during the period of the temporary restraint.

PRAYER

For all of the foregoing reasons Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and upon review of the record in that Court, to reverse its judgment and remand the case to it with directions that it remand the case to the United States District Court for the District of Minnesota with directions to

determine whether or not the order of the Interstate Commerce Commission requiring the cancellation of the increased rates at issue was valid, and, if it finds that it was, to refer the case to the Interstate Commerce Commission for a determination as to what rates were maximum reasonable rates during the period of the temporary restraint of the Commission's order.

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